to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinizing the document before signing it was that he was too busy or too lazy. *In general I do not think he can be heard to say that he signed in reliance on someone he trusted.* But, particularly when he was led to believe that the document which he signed was not one which affected his legal rights, there may be cases where this plea can properly be applied in favour of a man of full capacity.

The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea of *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which give him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case.

Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser. That has always been the law and in this branch of the law at least I see no reason for any change."
(Italics is mine)

To my mind, the excuses of the first defendant in support of his plea of *non est factum* are not dissimilar to the examples given in Lord Reid's speech. At any rate, it is highly improbable that the first defendant did not know that the paper that he signed was an instrument in the nature of a power of attorney. It was signed, sealed and delivered in the presence of one Othman b. Ismail, Commissioner of Oaths of the High Court at Alor Star. Furthermore, the said Othman b. Ismail endorsed at the back of the power of attorney a certification which declared, *inter alia,* that the first defendant had acknowledged to him that "he is of full age and that he has voluntarily executed this instrument". In the circumstances, the first defendant's averments that (a) the said papers were signed in the second defendant's house at night and (b) the first defendant's signature was obtained by the second defendant on the second defendant's misrepresentation cannot be true. Furthermore, if the first defendant really did not know that he had signed a power of attorney and had no intention of giving the power of attorney to the second defendant, it is highly inconceivable that he would not have informed the plaintiff when the latter wrote to him on February 24, 1982 about the refusal on the part of the second defendant to finalize the sale agreement. The plaintiff wrote to him twice and in the second letter dated July 15, 1982, he had reminded the first defendant about his participation in encouraging the plaintiff to sign the agreement and to pay over the sum of $5,000. It also reiterated the promise made by the first defendant to see that the sale transaction would be completed by mid-July 1982 (see exhibit "ZA5" attached to the affidavit of the plaintiff dated January 28, 1986). If the first defendant is really innocent and has no knowledge whatsoever of the power of attorney, his failure to respond at all to that letter is highly inconsistent with his claim.

For the above reason, I am satisfied that the first defendant has failed to show this court that there is any triable issue in his purported defence.

Order accordingly.

Solicitors: *Tan Seng Hong & Co.; Syarikat Lim Kiam Hoon.*

HASHIM BIN DIN v. SATO KOGYO CO. LTD.

[O.C.J. (Lim Beng Choon J.) September 8, 1987]

[Alor Setar – Civil Suit No. 22-28-86]

Civil Procedure – Writ and statement of claim – Striking out – Application for – Principles applicable – Prayer for special damages – Whether can be allowed – R.H.C. 1980, O. 18 r. 19.

In his statement of claim, the plaintiff alleged that the defendants had trespassed onto two parcels of land of which the plaintiff was the registered owner. It was further contended that the defendants had entered into the said land without the permission and consent of the plaintiff for the purpose of removing red earth therefrom and in so doing the defendants had also caused damage to the said land when in the course of their excavating the same they had created trenches and pot holes.

By their present application, the defendants sought to strike out the statement of claim and the writ. The grounds for their application were: (i) there was no reasonable cause of action; (ii) the action was frivolous and vexatious.

Held: (1) it is trite law that the summary power under Order 18 rule 19 to strike out a writ or a statement of claim

as disclosing no reasonable cause of action should be exercised only in plain and obvious cases;

(2) it is also to be noted that in striking off the writ or pleadings on the ground that there is no reasonable cause of action no affidavit is admissible in support of the application and the court must only scrutinize the following documents: the writ and the pleadings of the parties;

(3) the court was convinced that the allegations made therein do disclose a reasonable cause of action. It is trite law that trespass to land *per se* gives rise to an action in tort. There was therefore some ground to support the plaintiff's action regardless of the fact that he may not likely succeed when the case goes on to full trial. The contention of the defendants that there was no reasonable cause of action to sustain the present action of the plaintiff cannot be sustained and must on principle and authorities be rejected;

(4) as long as the plaintiff can base his action on a cause of action recognizable by the court, he cannot be shut out from moving the court to entertain his action notwithstanding that it might not possibly succeed at the end of the day;

(5) the plaintiff's prayer for special damages cannot be allowed for it is a well-settled principle of law that particulars of special damages must be particularized and it is not sufficient to aver a bare assertion that the plaintiff had suffered special damages;

(6) the defendants' application was dismissed except for the prayer for special damages.

Cases referred to:

(1) *Rediffusion (Hong Kong) Ltd.* v. *A.G. of Hong Kong* [1970] A.C. 1136, 1158.
(2) *Wenlock* v. *Moloney* [1965] 2 All E.R. 871.
(3) *Mooney & Ors.* v. *Peat, Marwick, Mitchell & Co. & Anor.* [1967] 1 M.L.J. 87.
(4) *Borough of Southwark* v. *Williams* [1971] 2 All E.R. 175.
(5) *Young* v. *Holloway* [1895] P. 87.

APPLICATION.

Poh Ah Ley (Ms.) for the applicant.
Ahmad Farid for the respondent.

Cur. Adv. Vult.

Lim Beng Choon J.: This is an application for an order that the writ and the statement of claim be struck out pursuant to Order 18 rule 19(1) of the Rules of the High Court (enclosure 5). The grounds for the application are: (1) there is no reasonable cause of action; (2) the action is frivolous and vexatious.

In considering the statement of claim in order to find out what is the cause of action relied upon by the plaintiff in support of the present action it is clear from paragraphs 3 and 4 of the said statement of claim that his action is grounded on an allegation that the defendants had trespassed onto two parcels of land comprised in the titles HS(M) 51/84 and HS(M) 52/84 of which the plaintiff was the registered owner of the said land. It is further contended that the defendants had entered into the said land without the permission and consent of the plaintiff for the purpose of removing red earth therefrom and in so doing the defendants had also caused damage to the said land when in the course of their excavating the same they had created trenches and pot holes.

It is trite law that the summary power under Order 18 rule 19 to strike out a writ or a statement of claim as disclosing no reasonable cause of action should be exercised only in plain and obvious cases. The principle governing the exercise of this summary power is clearly explained in the case of *Rediffusion (Hong Kong) Ltd.* v. *A.G. of Hong Kong*[1] where Lord Diplock in delivering the majority judgment of the Privy Council in that case said:

"It is a well-established principle that the summary power under R.S.C. Order 18 rule 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases. This principle can be shown to be correct according to the evident intention of the rule for several reasons: (1) There is the reference to a 'reasonable' cause of action or defence. (2) There is the context of 'scandalous, frivolous or vexatious' and 'prejudice, embarrass or delay the trial of the action' or 'otherwise an abuse of the process of the court'. (3) The application is made at a very early stage of the action when the pleadings are not complete and no evidence have been adduced."

It is also to be noted that in striking off the writ or pleadings on the ground that there is no reasonable cause of action, no affidavit evidence is admissible in support of the application and the court must only scrutinize the following documents: the writ and the pleadings of the parties. See *Rediffusion (Hong Kong) Ltd.'s* case[1] at p. 1159F. The scope of this proposition is also well exemplified in *Wenlock* v. *Moloney*[2] where it is stated at p. 873 as follows:

"It is said before this court (and no doubt was said before the master) that the affidavits were put in not under (a) but under (b) and (d) of rule 19(1). If, as here, the only ground on which the action can be said to disclose no reasonable cause of action is that it is not one which is likely to succeed then I doubt whether the affidavit is admissible. There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action where facts and issues had been raised and were in dispute. *To try the issue in this way is to usurp the function of the trial judge.*" (Emphasis is mine)

A similar approach was adopted by our High Court in *Mooney & Ors.* v. *Peat, Marwick, Mitchell & Co. & Anor.*[3] In that case the question before the court was whether the statement of claim ought to be struck out under Order 25 rule 4 of the old Rules of the Supreme Court as disclosing no reasonable cause of action. In dismissing the application, Raja Azlan Shah J. (as His Highness then was) stated at p. 88:

"It is firmly established that the power exercisable under rule 4 'is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for': see the judgment of Lindley M.R. in *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark Ltd.*, ([1899] 1 Q.B. 86, 91). Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any statable case can be made for this application: see *Peck* v. *Russell* ((1923) 4 F.M.S.L.R. 32, 34). The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses *some* ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out: see *Boaler* v. *Holder* ((1886) 54 L.T. 298). A recent exposition of the law is afforded by the judgment of Danckwerts L.J. in *Wenlock* v. *Moloney* ([1965] 1 W.L.R. 1238, 1243)."

I shall now proceed to consider the present application made by the defendants bearing in mind the principles enunciated by the judgments in the cases which I have cited earlier. Upon a cursory glance of paragraphs 3 and 4 of the statement of claim, I am more than convinced that the allegations made therein do disclose a reasonable cause of action. In saying so I took note of the fact that the plaintiff's cause of action is based on trespass to land *simpliciter*. It is trite law that trespass to land *per se* gives rise to an action in tort. There is therefore *some* ground to support the plaintiff's action regardless of the fact that he may not likely succeed when the case goes on to full trial (see the case of *Mooney & Ors.* v. *Peat, Marwick Mitchell & Co. & Anor.*[3]). It follows therefore that the contention of the defendants that there is no reasonable cause of action to sustain the present action of the plaintiff cannot be sustained and must on principle and authorities be rejected.

As regards the second ground, namely, that the present action is frivolous and vexatious, I was inclined to reject it in view of my finding that the plaintiff has a reasonable cause of action. But, however that may be, I restrained myself from rejecting the contention without a thorough consideration particularly when the defendants had filed in this court four affidavits in support of their application and basing on the facts as stated in the said affidavits the learned defence counsel in developing her submission raised three interesting points to sustain the contention that the plaintiff's action was frivolous and vexatious. Firstly, the learned defence counsel argued that as the defendants were given the go-ahead, so to speak, by the government to carry out the road project which was necessary and urgent in the interest of the public, the defendants should be immune to any charge of trespass. In short, she relied on the doctrine of necessity to shut out the plaintiff from approaching this court to air his grievance. The short answer to this argument is that the defence of "necessity" does not and cannot be accepted as sufficient to establish at this stage that the action of the plaintiff is frivolous or vexatious. The doctrine of necessity is nothing more than a defence available to the defendants and which can only be determined at the trial proper – see *Borough of Southwark* v. *Williams*[4]. Secondly, the argument of the learned defence counsel (if I have not misunderstood her) rested on the fact that the plaintiff had by his conduct granted a licence to the defendants to enter onto his land comprised in the grant No. HS(M) 51/84. In this contention, the learned defence counsel mounted a two-pronged attack to reinforce that the action was frivolous and vexatious, namely, that (i) on January 20, 1986 the plaintiff went to his land and saw the works that were being carried out by the defendants and yet he did not take any action to stop the defendants from carrying on the works; neither did he raise any objection on the works that were being carried out by the defendants and (ii) on February 5, 1986 the plaintiff had entered into a written agreement with one Yap Chon Seng, who the defendant claimed to be a sub-contractor of the road-building project, allowing the said Yap Chon Seng to remove red earth from the defendant's land held under the title HS(M) 51/84. The learned defence counsel therefore submitted that the plaintiff had by his conduct given a licence to the defendants to carry out the works on his land. He is therefore precluded from alleging any trespass on the part of the defendants. The plaintiff, on the other hand, filed a supplemental affidavit dated March 9, 1987 (enclosure 17) in which he said that on his visit to his land on January 20, 1986 he had informed the defendants' representative that the defendants were trespassing on his land and he demanded that the defendants should pay him compensation for the trespass and

damage in respect of the said land. The plaintiff went on to say in the said supplemental affidavit that at first the officer to whom he made the demand agreed to pay compensation in principle but after consultation with the JKR engineers he withdrew his agreement. Thereafter the plaintiff lodged a report at the Kuah police station. As regards to the allegation of the plaintiff having entered into an agreement with Yap Chon Seng, the plaintiff did not deny the making of the agreement with the said Mr. Yap, nevertheless in his affidavit in reply dated February 14, 1987 (enclosure 8) he asserted that the defendants were not a party to the said agreement. However that may be, it is my considered opinion that whether a plaintiff did or did not by his conduct be precluded from alleging trespass on the part of the defendant is a serious question and that can only be determined at the trial of this action and it would be premature for me to determine this issue merely on affidavit evidence. At any rate, I did take note of the fact that the plaintiff had instructed his solicitors to write to the defendants which they did on February 12, 1986 alleging that the defendants had committed a trespass to his land and that he demanded the defendants to move out of his land or alternatively to compensate him for damages caused to his land. In view of this conflicting evidence, there is so much more reason for me to deal with these points at the trial proper and not in this interlocutory proceedings. Another point raised by the learned defence counsel in support of this application was that the government had some time in September 1986 acquired the land and compensation had been awarded to the plaintiff in the sum of $19,312.50. This award was made on December 15, 1986 and the plaintiff had accepted that sum as compensation for the acquisition of his land. In view of the acceptance of the compensation, the learned defence counsel therefore argued that the plaintiff, having been fully compensated, could not now come to this court and claim for further compensation. In considering this contention, it is worthy to note that in his statement of claim, the plaintiffs alleged that the defendants committed a trespass to two parcels of his land held under titles HS(M) 51/84 and also HS(M) 52/84. The land acquired by the government was comprised in the title HS(M) 51/84 and the plaintiff's land under title HS(M) 52/84 was not acquired. In the circumstances, I cannot see how the plaintiff could be precluded from moving this court to consider the allegations made by him in his statement of claim notwithstanding the acquisition of the parcel of land held under the title HS(M) 51/84. In passing and without deciding, I may perhaps say that at the trial proper the plaintiff may not be able to prove any damages suffered by him and therefore he would be entitled to only a nominal damage in respect of the trespass alleged to have been committed by the defendants. But the significant point is this: trespass *per se* is an actionable tort regardless of whether the landowner could or could not claim any damages. In this connection, I would refer to the case of *Young* v. *Holloway*[5]. One of the issues in that case was that the plaintiff there claimed he was entitled as next of kin in the distribution of the estate of one Thomas Holloway. His claim was based on the fact that in 1876 the deceased had made a will in which he was one of the beneficiaries. However, in 1883 the deceased had made another will which had the effect of revoking the earlier will. The respondent there filed a motion to dismiss the action of the appellant on the ground that apparently no will of 1876 was likely to be produced to sustain the allegation of the appellant that he was a beneficiary of the said estate and the action of the appellant was frivolous and vexatious. In rejecting the contention of the respondent, the Court of the Probate Division said:

> "At present the plaintiff produces *some evidence* to establish the existence of such a will containing a legacy to him, and a conspiracy to suppress it; but there is nothing to indicate the amount of such legacy, nor, except in a very general way, the contents of the will. If, however, there be any truth in the statement that such a will was prepared in the manner alleged, *it may possibly be that further details of its contents may come to light.* It is so important not to shut out a litigant from what may, even possibly, be the assertion of *a just right*, that I cannot take on myself, at this stage, to say that this part of the case is so clearly frivolous that I should stop the proceedings." (Emphasis is mine)

The principle that can be distilled from that authority is that as long as a plaintiff can base his action on a cause of action recognizable by the court, he cannot be shut out from moving the court to entertain his action notwithstanding that it might not possibly succeed at the end of the day.

However, that is not the end of the matter as the learned defence counsel in her submission also pointed out to me that the reliefs asked for by the plaintiff in prayer (a) of his statement of claim for an injunction to restrain the defendant from trespassing into his land, and in prayer (b) where he asked for an order that the defendant do remove the machineries and implements thereon, cannot be sustained in view of the facts that the road project was completed and the defendants were no

longer in occupation of the land. To this contention, I fully agree. What had been done even if it were unlawful cannot be undone. In the circumstances, the plaintiff's entitlement would comprise merely a monetary payment by way of damages for the loss (if any) owed to him by the defendants' acts committed prior to the completion of the road over the land. I am also of the view that prayer (d) asked for by the plaintiff for special damages cannot be sustained for it is a well-settled principle of law that particulars of special damages must be particularized and it is not sufficient to aver a bare assertion that the plaintiff had suffered special damages. I would therefore strike out the said prayer (d) with liberty for the plaintiff to apply. In view of the above, the application of the defendants to strike out the writ and the statement of claim is dismissed subject to the three prayers which have been struck out for the reasons as stated above.

Order accordingly.

Solicitors: *Lim Huck Aik & Co.; Radzi Sheikh Ahmad, Noor & Farid.*

TAN ENG CHOONG v. FOO KAI YUEN & ANOR.

[A.C.J. (V.C. George J.) July 27, 1987]

[Kuala Lumpur – Civil Suit No. C22-165-86]

Civil Procedure – Summary disposal under Order 43 rule 1(i) of the Rules of the High Court – Order for – Application for – Whether application can be made – Status of contractual agreement made between the parties – Status of parties.

The first defendant invited the plaintiff to join him as a partner in his law practice. The plaintiff agreed and they practised together for a certain time. Later, the plaintiff resigned and left the firm. The plaintiff, thereafter, sought for an account from the first defendant in respect of the firm and certain other consequential orders. The plaintiff took out an application under Order 43 rule 1(i) and obtained a summary disposal of the claim. The first defendant appealed.

Held, allowing the appeal: since the status of the parties and their contractual agreement were far from being clear, moving the court for a summary order under Order 43 rule 1(i) was misconceived.

APPEAL AGAINST SUMMARY ORDER.

Cyrus Das (*P.H. Yeo* with him) for the plaintiffs.

Dominic Puthucheary for the defendants.

Cur. Adv. Vult.

V.C. George J.: The first defendant appealed against the decision of the learned Senior Assistant Registrar in respect of the summary order he had granted for accounts pursuant to Order 43 rule 1(i) of the Rules of High Court.

The first defendant had invited the plaintiff to join him as a partner in his law practice. The plaintiff accepted the invitation and they practised under the name and style K.Y. Foo & Co. The plaintiff says that the terms of the partnership agreement are as set out in a letter he had drafted which is exhibited as TEC-1 to the plaintiff's affidavit encl. (4). The first defendant on the other hand says that TEC-1 does not reflect all the terms of the partnership agreement. He says that the terms are as set out in paragraph 2(b) of the statement of defence.

After the two parties functioned as partners for about a year, it would appear that the first defendant informed the plaintiff that he should leave the partnership. The plaintiff thereupon sent a letter of resignation to the first defendant to be effective on March 30, 1984 but the first defendant told the plaintiff that he should leave at the end of February 1984. The plaintiff left the practice.

In 1986, the plaintiff caused this writ to issue and sought thereby for an account from the first defendant in respect of the firm and for certain consequential orders. The plaintiff went on to take out an application under Order 43 rule 1(i) and obtained a summary disposal of the claim for an account and the consequential orders.

The first defendant had contended and contends in the appeal that the plaintiff is not entitled to an account in respect of the legal practice on the grounds that the plaintiff in fact had never been a partner of the firm. It was contended that the position that obtains in this case was that the plaintiff had functioned on the basis that the terms of the partnership were as set out in the draft of his said letter TEC-1 whereas the first defendant had functioned on the basis that the terms were as set out in paragraph 2(b) of the statement of defence. The first defendant's contention is that in that